IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-16

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, AND WILLIAM P. ROGERS, SECRETARY OF STATE,

Appellants,

v.

ERNEST MANDEL, DAVID MERMELSTEIN, WASSILY LEONTIFF, NORMAN BIRNBAUM, ROBERT L. HEILBRONER, ROBERT PAUL WOLFF, LOUIS MENASHE, NOAM CHOMSKY, AND RICHARD A. FALK,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of the Court, pursuant to Rule 42 of the Rules of this Court.

STATEMENT OF INTEREST

The American Civil Liberties Union has included among its purposes since its formation in 1920, the object to maintain and advance civil liberties including the freedom of association, press and speech for all people throughout the United States.

In implementation of this purpose, the American Civil Liberties Union has deplored the practice of the United States of denying visas to aliens who wish to express their opinions before the American public. In the view of the American Civil Liberties Union, this practice constitutes an interference with the right of the American people to hear all views and to form their own judgments.

The issue presented by this appeal is whether a statute which bars aliens from the United States upon the basis of their advocacy of proscribed views is unconstitutional upon the ground that it deprives American citizens of freedom of speech.

The American Civil Liberties Union believes that the statute is in conflict with the First Amendment's proscription that "Congress shall make no law . . . abridging the freedom of speech . . . ". This brief is submitted in an effort to assist the Court in its analysis of the applicability of the First Amendment to a statute which, although directed to the exclusion of aliens from our borders, affects the rights of persons within the United States.

JURISDICTION

The judgment of the three-judge district court (J. App. 60a) was entered on April 13, 1971. The notice of appeal (J. App 62a) was filed on May 3, 1971. On May 11, 1971, the district court granted a stay of its judgment until June 10 1971 (App. 92) and on June 10, 1971, granted a further stay (App. 93) pending decision on appeal. This Court noted probable jurisdiction on January 10, 1972 (App. 94). The jurisdiction of this Court rests upon 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(a)(28)(D) and (G)(v), which provide that certain aliens shall be excluded from entry into the United States are unconstitutional on the ground that they deprive American citizens, who wish to hear in person an alien excluded under those provisions, of freedom of speech under the First Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 212(a) of the Immigration and Nationality Act of 1952 provides in pertinent part:

> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *
>
> (28) Aliens who are, or at any time have been, members of any of the following classes:
>
> * * * * *

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of World communism or the establishment in the United States of a totalitarian dictatorship * * *

* * * * *

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published or displayed, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching * * * (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

* * * * *

STATEMENT

American appellees are each citizens of the United States and members of the faculty of a college or university: Norman Birnbaum, Department of Anthropology-Sociology, Amherst College; Noah Chomsky, Department of Linguistics, Massachusetts Institute of Technology; Richard A. Falk, Center of International Studies, Princeton University; Robert L. Heilbroner, Department of Economics, New School for Social Research; Wassily Leontiff, Department of Economics, Harvard University; Louis Menashe and David Mermelstein, Department of Social Sciences, Polytechnic Institute of Brooklyn, and Robert Paul Wolff, Department of Philosophy, Columbia University (App. 7, 23-24).

They and others invited Ernest Mandel, a Belgian citizen residing in Brussels and "an internationally noted Marxian scholar and economist", to participate in a series of lectures,

panel discussions, seminars, and other interchanges within the academic community. These included a conference sponsored by Stanford University and its Graduate Student Association in which Mandel was to participate in a debate and panel discussion with John Kenneth Galbraith on the subject: "Technology and the Third World"; two colloquia sponsored by the Department of Philosophy at Princeton University, a conference at Town Hall in New York, sponsored by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference on the theme "Agencies of Social Change: Towards a Revolutionary Strategy for Advanced Industrial Countries"; a seminar conducted by the Department of Anthropology-Sociology at Amherst College, a conference at Massachusetts Institute of Technology sponsored by two groups of undergraduate and graduate students on "Social and Economic Conversion" on panels with John Kenneth Galbraith, Samuel Bowles, Noah Chomsky, S. F. Luria, Seymour Melman, J. P. Neilands, Daniel P. Moynihan, Kenneth Cockrel, Harvey Swados, and Susan Sontag; a lecture sponsored by the Graduate Faculty of the New School for Social Research; a conference at Vassar College; and participation in a discussion with the Department of Philosophy at Columbia University (App. 23-39).

To fulfill these engagements, Mandel applied for a non-immigrant visa to make a "temporary visit to the United States" (App. 68-70). The American consul in Brussels found that he was ineligible to receive a visa by reason of Section 212(a)(28)(D) and (G)(v) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(a)(28)(D) and (G)(v), which forbids visas to aliens who "advocate the economic, international and governmental doctrines of World communism" and "who write or publish any written or printed matter . . . advocating or teaching . . ." such doctrines (App. 13).

However, pursuant to the authority vested by Section 212(d)(3)(A) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1182(d)(3)(A), the Secretary of State, acting through the Visa Office, recommended that the Attorney General waive Mr. Mandel's ineligibility for a visa "in the interest of free expression of opinion and exchange of ideas" (App. 48-49). The Immigration and Naturalization Service (acting for the Attorney General) determined that the "waiver was not warranted", (App. 48-49). A visa was refused to Mandel (App. 68). As a result, his arrangements to participate in the various academic events in the United States were cancelled, but he nonetheless delivered through a transatlantic telephone hook-up, his scheduled speech at the Town Hall in New York on "Revolutionary Strategy in Imperialist Countries" (App. 30, 55-66).

SUMMARY OF ARGUMENT

I. The decision below is proper and should be affirmed in order to implement the rights of persons within the United States to engage in academic interchange with scholars abroad regardless of the doctrines espoused. The American appellees have both the standing to assert this right, and a legal interest in the protection which the First Amendment gives to hear speech as well as to make it.

II. Nor does it affect the competence of this Court to determine this question because the intended speaker is an alien who is being excluded from the United States pursuant to an act of Congress. The power to exclude persons can be no greater than the power to exclude books or transoceanic communications, if the sole basis of the exclusion is the advocacy of an idea. An abridgment of free speech is not less an abridgment if Congress chooses to exclude the person who is to engage in academic interchange from the United States, his books, or his telephone conversation.

III. The decisions of this Court involving challenges to deportation and exclusion laws by aliens are not controlling here because the rights being asserted here are by citizens of the United States on their own behalf. Even so, those decisions, while granting virtually complete deference to the laws of Congress, have nonetheless scrutinized constitutional claims raised by aliens claiming the protection of the Constitution. To the extent that there are pages and even a volume of history which have permitted the Congress to adopt legislation which denies substantial due process to aliens who seek to enter and to remain in the United States, these cases should be re-examined in the light of the limitations which the Constitution imposes upon Congress in regulating speech, in making racial classifications, and in denying substantial due process to aliens in our midst and knocking at our doors.

ARGUMENT

Appellants' major, indeed sole premise is that this case is governed by an inherent sovereign power, plenary in nature, "deriving from ancient maxims of international law," to exclude aliens, and that it is "entrusted exclusively to the Congress" being "beyond the concern or competence of the Judiciary" (Br. 11).

This view has been repeatedly urged upon this Court, but rarely, if ever, adopted in those terms only, or applied with such a blunderbuss aim. A discrete analysis of the decisions of this Court indicates (1) that the appellants' absolutist doctrine regarding the rights of aliens has not, in fact, been the approach of this Court, and that (2) in any event, it does not bear upon the inhibition imposed upon the Congress by the First Amendment insofar as its laws affect the rights of persons within the United States.

1.

The First Amendment's guarantee of freedom of speech includes the right to hear and is for the benefit of the listener as well as of the speaker.

Appellants have given scant, if any, attention to the settled decisions of this Court which hold "that the Constitution protects the right to receive information and ideas". *Stanley v. Georgia*, 394 U.S. 557, 564 (1968):

> "This freedom [of speech and press] . . . necessarily protects the right to receive . . . . ' Martin v. City of Struthers, 319 U.S. 141, 143 (1943); see Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308, 398, 402, 403 (1965) (Brennan, J., concurring); cf. Pierce v. Society of Sisters, 268 U.S. 510 (1925). This right to receive information and ideas, regardless of their social worth, see Winters v. New York, 333 U.S. 507, 510 (1948), is fundamental to our free society."

See also *Thomas v. Collins*, 323 U.S. 516, 534 (1945), invalidating a statute which required labor organizers to register before attempting to exhort workers to join a union as an unconstitutional restraint on "the rights of the workers to hear . . . "

In response to a claim of a governmental obligation to "protect" the public from disconcerting ideas, Justice Jackson observed (Concurring opinion, 323 U.S. at 545):

> But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

Nor have the appellants taken into account the standing which the appellees have to assert these rights. The language

in *Data Processing Service v. Camp*, 397 U.S. 150, 153-154 (1970) is instructive here. In distinguishing between the "legal interest" and the "standing" to bring an action, the Court declared:

> The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question of whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question . . . that interest, at times, may reflect 'esthetic, conservational and recreational' as well as economic values . . . A person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the establishment clause and the free exercise clause. Abington School District v. Schempp, 374 U.S. 203.

The standing, as well as the legal interest of the American appellees, are underscored by the decision of this Court in *Sweezy v. New Hampshire*, 354 U.S. 234, 249-252 (1956):

> [P]etitioner's right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation . . . . These are rights which are safeguarded by the Bill of Rights . . . . We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which governments should be extremely reticent to tread.

II.

A Statute Which Bans The Advocacy, Without More Of "The Economic, International, And Governmental Doctrines Of World Communism And The Writing And Publishing Of Such Doctrines" Is In Violation Of The First Amendment As A Law Which Abridges The Freedom Of Speech.

American appellees are university professors who wish to engaged in academic discussions with Mandel and have arranged for his participation in various university programs for such a purpose. They seek his entrance solely as a means by which they may exercise their First Amendment rights. Section 212(a)(28) has been broadly framed by the Congress to protect the internal security of this nation from the threat posed by the advocacy of the doctrines espoused by Appellee Mandel and which American appellees wish to hear.

Since *Schenck v. United States*, 249 U.S. 47 (1919), this Court has consistently recognized First Amendment limitations upon the power of the Congress to legislate in the area of national security. In *Dennis v. United States*, 341 U.S. 495 (1951) this Court acknowledged that:

> [T]hroughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken. 341 U.S. at 545 (Mr. Justice Frankfurter concurring).

In *Noto v. United States*, 367 U.S. 290, 297-98 (1961), the distinction was re-emphasized for:

> the mere abstract teaching of communist theory, including the teaching of propriety or even necessity for force and violence is not the same as preparing a group for violent action and steeling it to such action.

When placed against these standards, Section 212(a)(28) on its face is clearly violative of the First Amendment, for it seeks to regulate by exclusion ideas which may not be regu-

lated. Nor can it be asserted, as Appellants have, that Mandel's entrance is action and not speech, therefore beyond the protection of the First Amendment. Such an argument leads to the inevitable conclusion that although the government may not silence the speaker at the podium, it may prevent him from every reaching the podium. Cf. *Kunz v. New York*, 340 U.S. 190 (1951). The statute here involved will not meet the test of constitutionality developed in *United States v. O'Brien*, 391 U.S. 367 (1968), for the effect on First Amendment freedoms is far from incidental. If there were any legitimate primary interest assertable by the Government necessitating a slight and unavoidable restriction on First Amendment rights, Section 212 (a)(28) could stand. No such showing can be made with respect to the statute for exclusion is based solely upon the doctrines advocated by Mandel. Likewise, assuming the application of the balancing tests suggested by *Speiser v. Randall*, 357 U.S. 513 (1958) and *American Communications Association v. Douds*, 339 U.S. 382 (1950), the governmental interest does not outweigh the loss to appellees of their First Amendment rights.

Involved here is that advocacy and debate basic to the functioning of the American academic system. Over time there has developed a protective attitude toward the important concept of academic freedom of discussion. In *Sweezy v. New Hampshire*, 354 U.S. 234 (1956), the Court stated:

> The essentials of freedom in the community of American universities is almost self-evident . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die. 354 U.S. at 234.

See also *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frank-

furter, J., concurring); *Tinker v. Des Moines School District*, 393 U.S. 503, 512 (1969) for decisions of this Court expressing concern for the principle of freedom in education. The government does not possess the power to limit the dissemination of ideas among the peoples of this country with the exception of reasonable limitations as to time, place, circumstances and manner. Free speech is a retained right of the citizens of this country.

By whatever theoretical approach one takes with respect to the degree of freedom encompassed by the First Amendment, it is clear that it was intended that "the freedoms embodied in the First Amendment must always secure paramountcy." James Madison as quoted in Cahn, "The Firstness of the First Amendment," 65 Yale L.J. 464, 473 (1956).

The essence of an informed public is the constant interaction of conflicting viewpoints. Vigorous debate on topical issues serves this end and the public's right of access to diverse ideas must be the touchstone. This right may not be infringed absent the most compelling circumstances. See *Red Lion Broadcasting Company v. F.C.C.*, 395 U.S. 367, 385 (1969). Wide debate on public issues is a prerequisite to an informed and aware citizenry—the very essence of a democratic society. There is a " . . . profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . " *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). The role free speech plays in our society may be viewed as follows, "[F]or speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See also Meiklejohn, "The First Amendment is an Absolute," 1961 Sup. Ct. Rev. 245. This commitment to robust and unhibited debate will be sacrificed if Mandel is excluded pursuant to Sections 212(a)(28)(D) and (G)(v). The First Amendment requires at the very least that Mandel not be excluded for the advocacy of abstract Marxist doctrine, no matter how abhorrent that doctrine may be, for:

> [I]f there is any principle in that Constitution that more imperatively calls for attachment than any other it is the principle that free thought—not free thought for those who agree with us, but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into as well as to life within this country. United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Mr. Justice Brandeis, dissenting).

III.

The Fact That the Denial of Freedom of Speech Is Affected by Denying the Speaker Access to His Audience Is No Less an Abridgement of Freedom of Speech Because the Prohibition Is Accomplished by Excluding the Speaker As an Alien from Entering the United States.

Appellants argue that the Government may exercise its exclusion power under these sections because Mandel has no First Amendment right to enter the country and may therefore be excluded for the advocacy of such doctrines. But, *United States v. Robel*, 389 U.S. 258 (1967) rejected a similar argument as to the right of a subversive to employment in a defense facility. Answering the claim that there was no constitutional right to work in a defense plant, this Court stated:

> The operative fact upon which job disability depends is the exercise of the individual's right of association, which is protected by the First Amendment. 389 U.S. at 263.

Similarly here the operative fact upon which the exclusion of Mandel depends is his advocacy of the abstract doctrines of Marxist economics. The direct consequence which flows from his exclusion is to prevent the exercise by the American appellees of their First Amendment right to see, hear and to debate with Mandel in an academic forum. It is Mandel's advocacy of communist doctrine which here is the *sine qua non* of the statute. It is for that reason that

it runs afoul of the First Amendment regardless of whether the method of enforcing the prohibition is to exclude the advocate from the United States. *Yates v. United States*, 354 U.S. 298 (1957); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Stromberg v. California*, 283 U.S. 359 (1931); *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

In the light of these decisions, it is passing strange for the Appellants to argue that "Congress' exclusion of aliens such as Mandel does not implicate any First Amendment rights of appellees" (Br. 12). And it is not even specious to say as appellants do that it is not *speech*, but *action* which is involved (Br. 29-30).

Zemel v. Rusk, 381 U.S. 1, 16-17 (1965), as the court below pointed out (J. App. 27a-28a), distinguished between an area restriction upon the "right to travel", which was based there upon the due process clause, and a denial of a passport to a specific person as a "result of expression or association on his part". Unlike *Kent v. Dulles*, 357 U.S. 116 (1958) and *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), this Court observed in *Zemel*, "appellant is not being forced to choose between membership in an organization and freedom to travel."

Zemel is plainly no authority for holding that the denial of a visa to permit Mandel to come to the United States to engage in academic interchange with members of the university community is unprotected action and not protected speech.

But still less is it controlling upon the question raised here by the American appellees: whether the Congressional prohibition against the issuance of a visa to Mandel is a law, within the meaning of the First Amendment, which abridges their right to hear and to debate face-to-face Mandel's views. The "acts" which the American appellees assert are aural and verbal only.

IV

Formulation of Policies Regarding the Rights of Aliens to Enter and to Remain in the United States is Like All Congressional Powers Subject to the Restraints of the Constitution and is Subject to Review by the Judiciary.

Appellants seek to obliterate the First Amendment rights asserted by the American appellees by attempting to transmute the case into one involving merely "the right to bring an otherwise excludable alien into this country" (Br. 29, 23).[1]

However, even as limited to the rights which aliens may have under the Constitution, appellants' summation of the many decisions of this Court in this area is more hyperbolic than precise.

While it is true that *The Chinese Exclusion Case (Chae Chan Ping v. United States)*, 130 U.S. 581 (1888), described the power to exclude aliens as "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers" and declared that it is a "power to be exercised exclusively by the political branches of government" (Br. 20), it nonetheless observed that this power together with:

> The powers to declare war, make treaties, suppress insurrections, repel invasion, regulate foreign commerce, secure republication governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, *restricted in their exercise by the Constitution itself.* 130 U.S. at 604.

This view of the Powers of Congress, it should be unnecessary to argue, has governed the decisions of the Court

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[1] Appellants' reference to Mandel as an "otherwise excludable alien", whatever is meant by that phrase, cannot be taken to mean that the First Amendment is not involved in his exclusion since the denial of the visa is concededly based upon his advocacy of proscribed doctrines, and not "otherwise" (Br. 4-5).

in each of its applications. As to the war power, see *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U.S. 155 (1919); *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Robel*, 389 U.S. 258 (1967); as to the treaty power, see *DeGeofroy v. Riggs*, 133 U.S. 258 (1890); *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

As to the exercise of powers dealing with foreign relations or those which are "inherent in sovereignty," the applicable constitutional limitations have either been subsumed in the decisions of this Court or explicitly stated, albeit with results which have often denied substantial claims of aliens.

Thus *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893), a leading decision on the question of the powers of Congress over aliens,[2] declared:

> The power to exclude or expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by Act of Congress, and to be executed by the executive authority according to the regulations established, except so far as the judicial department . . . . *is required by the paramount law of the Constitution to intervene.* (emphasis supplied)

As its language indicates, the Court there made no distinction, significant here, between the power to exclude and the power to expel aliens. They " . . . . rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power." 149 U.S. at 713.

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[2]The Court there sustained [for example] a statute which required the deportation of Chinese laborers lacking a certificate of residence unless they were able to establish lawful residence "by at least one credible white witness"; Act of May 5, 1892, 27 Stat. 25; a decision dubious then, see dissenting opinions, C.J. Fuller, J. Brewer, and J. Field, at 732-64; and clearly inadmissible now.

Although the cases which have been the progeny of *The Chinese Exclusion Case* and of *Fong Yue Ting* have been mixed in their disposition of the constitutional claims of aliens and of citizens whom Congress would make aliens, the challenges of the various statutes have indeed been the "concern . . . of the Judiciary" and have in each case been determined to be within its "competence" to decide Constitutional questions. (Br. 24-25).

United States ex rel. Turner v. Williams, 194 U.S. 279 (1904), while declaring that Turner, an alien ordered excluded from the United States, "cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise", nonetheless canvassed the record, reviewed the statutory prohibition against the admission of "anarchists, or persons who . . . advocate the overthrow by force and violence of the government of the United States . . . or the assassination of public officials . . . ," and found that it could not say ". . . that the inference was unjustifiable . . . that his speeches were incitements to that end". 144 U.S. at 293-294.

It may be, therefore, that Turner, as an alien deemed excluded from the United States, may have had no claim upon the Constitution, but the Court did not eschew "judicial inquiry" nor did it "entrust . . (the matter) exclusively to Congress (Br. 23), choosing instead to hold, within its own competence, that "as long as human governments endure they cannot be denied the power of self-preservation." By way of underscoring the power of the judiciary to determine the constitutionality of legislation affecting the rights of aliens under the First Amendment, the Court distinguished the Alien and Sedition Law, and cited *The Chinese Exclusion Case* for its observation that ". . . [T]he validity of its provisions was never brought to the test of judicial decision in the courts of the United States." (194 U.S. at 295).

Similarly, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) and *Galvan v. Press*, 347 U.S. 522 (1954), relied upon by

appellants, as being holdings supporting the exclusivity of Congressional power over the rights of aliens to enter and to remain in the United States (Br. 23-25), dealt specifically with the constitutional objections raised.

Although applying to the power to divest citizenship, *Perez v. Brownell*, 356 U.S. 44 (1957); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Afroyim v. Rusk*, 387 U.S. 253 (1967) are relevant because the government in those cases also invoked arguments similar to those here suggesting an "'implied attribute of sovereignty" which permits divestiture of citizenship (*Afroyim*, 387 U.S. at 253); and a judicial deference to Congress in the "avoidance of embarrassment in the conduct of foreign relations" (*Schneider v. Rusk*, 377 U.S. at 166).

The short answer, therefore, to the appellants' contention that "'Congress has plenary power to control the admission of aliens and that under the Constitution these are matters beyond the concern or competence of the Judiciary" (Br. 11) is that the decisions of this Court do not so hold.

V

The Rights of Aliens to Enter and to Remain in the United States Warrant Reexamination by this Court in View of the Doubt as to the Continuing Validity of *The Chinese Exclusion Case* and *Fong Yue Ting*.

The cutting edge here is not whether this Court may determine whether the First Amendment denies to Congress the power to exclude aliens from the United States because of their views.

It is whether appellee Mandel as an alien, and moreover as an alien seeking entry to this country may challenge the policies which Congress may adopt regarding the rights of aliens to enter and remain in the United States.

From *The Chinese Exclusion Case* to *Harisiades*, it is clear that the decisions of this Court have been posited, upon the

effect which the foreign allegiance of the alien has upon his status with the United States.

Harisiades observes:

> So long as one . . . perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international law. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf.... The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. 342 U.S. at 585-6.

It is essentially for this reason that this Court has referred to legislation dealing with the rights of aliens as a "political question" "entrusted to the branches of the Government in control of our international relations and treaty-making powers." 342 U.S. at 591.

Baker v. Carr, 369 U.S. 186, 211 (1962) suggests the need for a "discriminating analysis" of the question posed here to determine whether, as to appellee Mandel's challenge of the statute, the issue is so "political" that it cannot be determined by the judiciary.

Plainly the issue to be determined here is no different from that decided in *Dennis v. United States*, 341 U.S. 495 (1951) and no more "political." The question whether aliens can be permitted to enter the United States if they "advocate the economic, international, and governmental doctrines of world Communism" appears no different from similar determinations involving the rights of citizens within the United States to hold such doctrines, or of persons with forbidden views to be employed in defense facilities, *United States v. Robel*, 389 U.S. 258 (1967), as a radio operator,

American Communications Association v. Douds, 339 U.S. 382 (1950); or a university professor, *Baggett v. Bullitt*, 377 U.S. 360 (1963).

The argument that Section 212 (a)(28) "manifests to the rest of the international community this country's opposition to the world Communist movement and continues to serve as a lever for negotiating with other nations reciprocal privileges for American citizens" (Br. 36) seems scant a basis for distinguishing these decisions. The suppression of all Communist thought within the United States would similarly manifest to the world our opposition to the Communist movement, yet the suppression of ideas would surely not be countenanced by this Court. The suggestion that the statute here is any kind of a lever, even if true, in the light of alternative "levers" which are less restrictive of constitutionally protected freedoms cannot be sustained. See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Given a governmental purpose to conduct its foreign relations so as to oppose the world Communist movement, since that "end can be more narrowly achieved" than by forbidding the entry to the United States of its advocates, this method of conducting foreign relations would appear to be denied to Congress under the doctrine set forth in *Schneider v. State*, 308 U.S. 147 (1939), *Cantwell v. Connecticut*, 310 U.S. 296 (1939), and applied with regard to travel in *Aptheker*.

However, the application of this doctrine of the field of alien control may very well require this Court to reexamine the inhibition which was suggested in *Galvan v. Press*, 347 U.S. 522 (1954):

There, Mr. Justice Frankfurter stated:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, see Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 155, . . . much could be said for the view,

> were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . .
>
> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," New York Trust Co. v. Eisner, 256 U.S. 345, 349 . . . but a whole volume.

As we have seen, however, that page of history is even more dubious now than it was when written. In the light of at least as many pages and volumes of history written by this Court which have invalidated racial classifications, can it now be said that the underpinnings of *The Chinese Exclusion Case* and of *Fong Yue Ting* are sustainable? A decision which states that "it seems impossible for (Chinese immigrants) to assimilate with our people or to make any change in their habits or modes of living" 130 U.S. at 595, and which upholds the power of Congress to "consider . . . the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . " 130 U.S. at 606, and to exclude all such aliens from the United States is based upon a racial classification which could not be sustained in determining the rights of such aliens within the United States for any other purpose. Yet in *Fong Yue Ting*, this Court, equating the power to exclude aliens with the power to expel them decided that "Chinese laborers . . . like all other aliens residing in the United States for a shorter or longer time . . . remain subject to the power of Congress to expel them, or order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest." 149 U.S. at 713.

It seems especially justifiable for this Court to reexamine these precedential pages of history in view of the fact that they were written before not only "expansion of the concept of substantive due process" as a limitation upon the war power and other related powers of the Congress,

but also before the sharpened awareness of this Court of the invidiousness of racial classifications and, as relevant here, prior to any decision asserting a free speech right under the First Amendment.

If "writing upon a clean slate" this Court would strike down a statute of Congress which required the expulsion, for example, of all aliens who are Jews or black, or who advocate the smoking of tobacco or the practice of birth control, there appears to be no reason not to correct a page of history which should never have been written. See *Brown v. Board of Education*, 347 U.S. 483 (1954).

CONCLUSION

For the reasons advanced, the judgment of the District Court should be affirmed.

Respectfully submitted,

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